THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LARRY P. CRAMER, Defendant-Appellant.

Fourth District No. 14061

Judgment affirmed.

Opinion filed October 12, 1978.

Mr. JUSTICE TRAPP delivered the opinion of the court:

Defendant appeals his convictions of conspiracy to commit murder (three counts), and solicitation to commit murder (six counts), entered upon jury verdicts.

Defendant's post-trial motion alleged some 70 errors, most of which are argued in defendant's brief. Upon *pro se* oral argument it is contended that the cause should be reversed for accumulated error and the argument was directed to the several errors discussed severally hereafter.

The sum of the allegations of the indictment is that between February 1974 and December 13, 1974, defendant conspired with a client, Weathington, to murder defendant's wife and that within such period defendant agreed and requested and encouraged Weathington to commit murder. (Ill. Rev. Stat. 1973, ch. 38, pars. 8—1 and 8—2.) On November 18, 1974, Weathington advised both the police and the State's Attorney of the schemes which are the subject of the prosecution and cooperated with them in the recording of certain conversations between the conspirators. He testified in behalf of the prosecution, both before the grand jury and at trial. Defendant's wife testified in behalf of the defendant. Defendant did not testify.

The trial court instructed the jury upon the issues of conspiracy in the language of IPI Criminal No. 6.04. The operative words considered here are, "Third. That an act in furtherance of the agreement was performed by any party to the agreement."

Defendant objected to the giving of the instruction for the reason that it failed to set forth the specific acts alleged in the indictment, and that it failed to require that one or more of the overt acts so alleged be proven beyond a reasonable doubt. The testimony includes and concerns acts of defendant and Weathington, any one of which may be deemed overt acts in furtherance of the conspiracy but which are not actually charged or alleged in the indictment.

The defendant also tendered an instruction which modified IPI Criminal No. 6.04, by stating in such third paragraph the overt acts which the indictment alleged were performed by defendant. The indictment did not allege any overt acts performed alone by the co-conspirator, Weathington. Defendant's tendered instruction was refused.

Section 8—2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 8—2) defines the elements of conspiracy. That definition concludes with the sentence:

> "No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is *alleged* and proved to have been committed by him or by a co-conspirator." (Emphasis supplied.)

During the period when the co-conspirator, Weathington, was cooperating with the police, certain telephone conversations of the alleged conspirators were recorded. The recordings were played before the jury during the course of the trial.

Shortly after retiring the jury requested a transcript of the several recordings. The trial judge concluded that such transcripts were not offered into evidence and could not be sent to the jury. The jury then requested that the tapes and a machine to play them be provided. The request was denied because of the judge's concern that the tape recordings might be damaged or erased.

After the jury had deliberated some 20 hours, the trial judge and counsel conferred on the record. At that time the judge stated that he would ask whether or not the jury was making progress, saying:

> "I propose to take the jury into the courtroom and inquire if they are making progress and if he says no, the foreman, and I propose to inquire of the foreman if playing the tapes would be helpful in arriving at a verdict. If he says yes, I then propose to ask each of the jurors as well. If each member of the jury says yes, I'm going to play the tapes for them *in camera* in the courtroom with only the defendant, his attorney, attorney for the people and the court being present."

Defendant's counsel objected to the playing of the tapes at such time after the prior jury request had been refused, asserting such to be an abuse of discretion and argued that playing the recording at that time would be a prejudicial emphasis upon the testimony. He also asked that certain defense cross-examination and evidence be reread to the jury. The court advised that he would not allow such defense testimony to be reviewed unless the jury asked for it.

The jury was returned to the courtroom and, upon inquiry, the foreman advised that he was of the opinion that the jury *was* progressing in its deliberations. The judge then asked:

> "Would it help, in your opinion, in this case if you were to hear the tapes played here in the courtroom?"

The foreman responded affirmatively as did each juror upon individual inquiry. The recordings were again played and the defendant's objections, together with a motion for a mistrial, were denied. The jury returned a verdict within 45 minutes. The issue is preserved in the post-trial motion.

The prosecution argues that there was a proper exercise of discretion in suggesting the replay of the recording because the previous denial may have discouraged renewal of the request although the jury may have continued to be uncertain or confused.

Certain other issues preserved in the post-trial motion and briefed and argued on appeal are noted.

Defendant argues that the issues instruction, IPI Criminal No. 6.04, was erroneous in that, while it required the prosecution to prove that the conspirators agreed to commit the crime, it did not require the State to prove that they intended to agree. The words "intended to agree" appear to be directed to the notion that they agreed to conspire. Thus, defendant alleges that the trial court erred in denying his tendered instruction, IPI Criminal No. 6.03, modified to read, "intends to, and does agree with another." He cites P. Marcus, *Criminal Conspiracy: The State of Mind Crime*, 1976 U. Ill. L. F. 627.

We find that the study is directed toward the law required in Federal convictions. 18 U.S.L.A. §371 (1966) provides, "If two or more persons conspire * * * to commit any offense * * *." We note that the former Illinois statute (Ill. Rev. Stat. 1961, ch. 38, par. 139) defined conspiracy in the language "[i]f any two or more persons conspire or agree together * * *."

The present statute defining conspiracy uses different language. Section 8—2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 8—2) provides, "A person commits conspiracy when, with intent that an offense be committed, *he* agrees with another * * *." (Emphasis supplied.)

Under the prior Illinois statute it was held that at least two parties with a common criminal intent are necessary to conspiracy, and where there are but two parties an acquittal of one required the discharge of the other. (*People v. Cohn* (1934), 358 Ill. 328, 193 N.E. 150.) It was held that more than one person must be guilty to sustain a conviction. *People v. Nathanson* (1945), 389 Ill. 311, 59 N.E.2d 677.

The present statute, however, specifically provides that these holdings are no longer effective. The present statute states in section 8—2(b) that:

> "It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:
>
> (1) Has not been prosecuted or convicted, or
>
> * * *
>
> (4) Has been acquitted, * * *." (Ill. Rev. Stat. 1973, ch. 38, par. 8—2.)

Citing the present Illinois statute defining conspiracy, Marcus notes:

> "Traditionally, courts analyzed the state of mind of *both* conspirators (the conspiracy requirement referred to two or more conspirators) to determine if more than one defendant intended to agree. If only one of the two conspirators meant to agree, and the other 'conspirator' only feigned agreement or had actually contacted the police, the state of mind necessary for a conspiracy would not exist; at least two parties must intend to enter into the conspiratorial relationship. More recently, however, the trend has

been away from requiring proof of an agreement by more than one defendant. The focus now is on the state of mind of the defendant on trial. This so-called 'unilateral approach' allows for the conviction of the defendant even if his 'co-conspirator' never intended at any time to enter into an agreement with the defendant. Typically, the unilateral approach statutes require that a court only focus on the intent of the accused to enter an agreement. The mental state of the defendant's co-conspirator is largely irrelevant." 1976 Illinois Law Forum 627, 628.

•1 By reason of our present statute we conclude that the intent to agree which defendant argues is encompassed within the language which requires allegations and proof that defendant agreed with another to commit an offense.

•2 Defendant argues that since the prosecution introduced evidence of motive, the trial court erred in denying his tendered instruction modifying IPI Criminal No. 3.04 to include "The State is required to prove a motive for the commission of the crime charged." The prosecution did not tender IPI Criminal No. 3.04. In *People v. Enright* (1912), 256 Ill. 221, 234, 99 N.E. 936, 941, the court said that if the accused committed the act, the question whether he had a motive or what it was is immaterial. While evidence tending to show the existence or nonexistence of the motive is admissible and the People may so show, they are under no obligation to do so. The opinion continues to state:

> "If the People claim that a motive existed inducing the commission of the act it must be proved, and, like any other circumstance, cannot be inferred, but as they are not required to show any motive a jury *should not be* informed that failure to show it tends to prove that the crime was not committed. • • •." (Emphasis supplied.) (256 Ill. 221, 234, 99 N.E. 936, 941.)

In *People v. Manzella* (1974), 56 Ill. 2d 187, 306 N.E.2d 16, the court stated that IPI Criminal No. 3.04 is to be used where the State had not attempted to prove motive. We conclude that defendant's argument misstates the rule of *Enright* and *Manzella*.

Defendant urges that the court committed reversible error in admitting into evidence what is termed evidence of other crimes. We summarize rather than detail the substance of the matter.

Weathington testified to the circumstances initiating the solicitation and conspiracy. Defendant had represented him as a client which apparently entirely consisted of criminal matters. The witness called at defendant's office in February 1974 to request a loan of $20. Defendant asked whether there was security and Weathington stated that he had some marijuana. Defendant inquired whether it was of good quality and smoked some in a pipe. There was no objection. The testimony is that during the course of the transaction defendant inquired whether the witness would like to make some money and the latter expressed interest. Without then naming the victim defendant proposed that Weathington assist in getting rid of someone. In a series of subsequent conversations,

Weathington was told the identity of the victim and various sums to be paid to Weathington were discussed. There followed suggestions and discussions regarding a series of schemes and methods for causing the death of the victim. The last proposal was that Weathington find a "hit man."

Weathington further testified that during later conversations he spoke to defendant regarding the then scheme of carrying out the conspiracy. At that time defendant stated that it was necessary to delay their preparations for the reason that there was some difficulty arising from his extramarital affair with the wife of a client. Defendant made objection and argued that the testimony was inadmissible, asserting prejudice. The prosecution suggested that the evidence was admissible to show motive and defendant's motions for mistrial were denied.

The prosecution failed to produce any further testimony concerning the extramarital problem which tended to establish motive. At the close of the prosecution's case, the court orally instructed the jury that "any evidence received in regards to the use of marijuana or immoral conduct was presented for the limited purpose of showing the relationship between the defendant and Mr. Weathington."

The written instructions included the language of IPI Criminal No. 1.01(6) regarding evidence admitted for a limited purpose. Defendant argues that the instruction was so delayed that the prejudice was not cured.

We agree with the trial court's conclusion that the testimony was relevant to the issues. In *People* v. *Manzella* (1974), 56 Ill. 2d 187, 196, 306 N.E.2d 16, 20, defendant argued prejudicial error in the admission of evidence of other assaults upon the victim. The evidence was held to be admissible, the court saying:

> "It is true, nevertheless, that evidence relevant to the main issue, and which serves to place the defendant in proximity to the time and place of the offense and which aids or establishes identity, and tends to prove design, motive, or knowledge, is admissible as an exception to the general exclusionary rule barring such evidence."

In *People* v. *Durso* (1968), 40 Ill. 2d 242, 239 N.E.2d 842, defendant, who was charged with murder, urged error in admitting evidence of narcotics transactions. The court stated the test for admission of evidence of other crimes was whether the evidence was so closely connected with the main issue that it tends to prove guilt of the crime charged.

The opinion in *People* v. *Tranowski* (1960), 20 Ill. 2d 11, 16, 169 N.E.2d 347, 349, states that other "crimes" which are wholly independent of and disconnected from the crime charged are not admissible, but continued:

> "But a corollary of the rule is that evidence, relevant to the main

issue, which serves to place a defendant in proximity to the time and place, aids or establishes identity, and tends to prove design, motive or knowledge, is admissible. [Citation.] Resolution of the conflict between the rule and the corollary depends on whether the evidence of other crimes is so closely connected with the main issue that it tends to prove the accused guilty of the crime for which he is being tried."

•3 The evidence at issue here was clearly intertwined with the negotiation and the progress of the conspiracy. It did not concern wholly independent and unrelated conduct clearly apart from the offenses charged. The transaction concerning a loan "secured" by marijuana was the point from which defendant opened discussion or suggestion of the acts constituting the objective of the conspiracy. That transaction was of a nature that might suggest to defendant that Weathington would be receptive to the proposals and did, as the trial judge concluded, explain the relationship between the parties.

The testimony concerning the extramarital affair originated in statements by defendant to Weathington explaining the cause for delay in the further discussion of the plans for carrying out the conspiracy. It was presented to the jury in the context of the course of the developing conspiracy, rather than introduced as wholly extraneous to the relation between the parties.

At the time that defendant objected to the testimony, the prosecution suggested the showing of evidence of motive. At that time the trial judge had no way of ascertaining the fact. At the close of the case in chief when all evidence regarding motive was disclosed to him he did instruct the jury of the limited purpose in the consideration of the jury.

•4 The argument that the rulings were too long delayed is not persuasive. Logically, it seems that orally instructing at the close of all prosecution evidence would more effectively impress than rulings scattered throughout the several days of testimony. We find no reversible error upon these issues.

Defendant argues that the trial court erred when it denied a motion to suppress certain electronic recordings, called "tapes," for the reason that it was not done in compliance with the then statute (Ill. Rev. Stat. 1973, ch. 38, par. 14—2(a)). That statute prohibited the use of eavesdropping devices unless such was done with the consent of one party and at the request of the State's Attorney. On four separate days telephone calls from Weathington to defendant were made from an investigating office. The recording device was attached to the telephone in that office and had no connection to defendant's telephone or its connecting lines. An assistant State's Attorney was present on each occasion.

The State's Attorney testified that he made a request for monitoring of

each call and that he had designated a named assistant to be in charge of such portion of the investigation. Each act of monitoring followed the request for that recording by the assistant State's Attorney and he was present. A fifth occasion involved the arrangement whereby Weathington wore a device which transmitted the conversation by radio and which was recorded.

The record shows no indiscriminate broad authority given to police officers to monitor defendant's conversations at their own discretion as in *People* v. *Porcelli* (1974), 25 Ill. App. 3d 145, 323 N.E.2d 1. In *People* v. *Richardson* (1975), 60 Ill. 2d 189, 328 N.E.2d 260, the Supreme Court determined that the State's Attorney had a large discretion in administering his duties in the authorization of eavesdropping activities. In *People* v. *Marlow* (1976), 39 Ill. App. 3d 177, 350 N.E.2d 215, the State's Attorney's request included the delegation of authority to a named assistant to authorize that it was done. The recorded evidence was held admissible. Here, as there, the assistant State's Attorney designated and specified the date and occasion for each recording. (See also *People* v. *Holliman* (1974), 22 Ill. App. 3d 95, 316 N.E.2d 812.) Defendant's argument that the State's Attorney gave "permission" rather than made a request is without merit.

●5 The several recordings occurred throughout a period of some three weeks. Defendant argues that that was an unreasonable period of time to authorize such recordings. We find the record supports the conclusion that each recording was made upon separate and distinct authorization.

●6 We have examined defendant's argument that there was not sufficient foundation to show the quality and accuracy of the recordings to permit their admission into evidence. We find no merit upon this point.

Defendant's argument that it was error to play the tapes in their entirety during the course of the trial is directed to the fact that they included conduct and references to conversations between Weathington and defendant which we have heretofore held admissible.

Defendant argues that the trial court erred in permitting the State's Attorney to play six portions of the tapes during the course of his argument. This record simply shows argument by the State's Attorney with a transcript notation that a portion of a tape was played. Neither the text heard nor the duration of the recording can be ascertained. Defendant likens the playing of the recording to the reading from a trial transcript during the course of an argument. Such has been considered to be error for the reason that there was an overemphasis of selected testimony. In *People* v. *Birger* (1929), 329 Ill. 362, 160 N.E. 564, however, it was held permissible for a State's Attorney to make a paraphrased recapitulation of testimony where his recollection had been refreshed

from notes or a transcript. In *People* v. *Morse* (1975), 33 Ill. App. 3d 384, 342 N.E.2d 307, *cert. denied* (1976), 426 U.S. 953, 49 L. Ed. 2d 1191, 96 S. Ct. 3179, it was held that a brief reference to the transcript was not reversible error. In *People* v. *Davies* (1977), 50 Ill. App. 3d 506, 365 N.E.2d 628, the court concluded that it was within the discretion of the trial court to permit the reading of a trial transcript during closing argument. That opinion noted the recent decision in *People* v. *Pierce* (1974), 56 Ill. 2d 361, 308 N.E.2d 577, which determined that it was within the discretion of the trial court to permit a jury to have a review of testimony after it retired to deliberate. That opinion states that the use of paraphrased recollection by an attorney penalized accuracy without necessarily reducing the emphasis of such testimony, and under the rationale of *Pierce* found no abuse of discretion in permitting the reading of a transcript which was "not so extensive as to unduly emphasize the testimony at issue * * *." (*Davies*, 50 Ill. App. 3d 506, 514, 365 N.E.2d 628, 634.) From this record it cannot be ascertained whether the recording played was so extensive as to produce a substantial prejudice.

The two principal issues have been stated but not yet reviewed.

•7 The trial court instructed the jury upon the issue of conspiracy in the language of IPI Criminal No. 6.04. The members of the panel agree that such instruction was error, in the light of the language of section 8—2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 8—2), providing:

> "No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator."

A majority of the panel concluded, however, that the evidence of defendant's guilt is so overwhelming that the error may be treated as harmless. Judge Trapp is of the opinion that the error is such a deviation from the law and precedent that reversal is required. He so concludes upon the authority of *People* v. *Dorsey* (1936), 363 Ill. 403, 2 N.E.2d 321; *People* v. *Galvan* (1976), 42 Ill. App. 3d 360, 356 N.E.2d 139, and *People* v. *Dickerson* (1976), 41 Ill. App. 3d 464, 353 N.E.2d 427.

In *Dorsey*, defendant was charged with conspiring to purchase for others the conspirator's securities at exorbitant and extortionate prices. The trial court refused defendant's tendered instructions designed to limit the jury's considerations to the allegations of a bill of particulars restricting the charge to allegations that certain securities were fraudulent and worthless. The trial court submitted the issues upon allegations regarding the extortionate charges. In reversing and remanding, the reviewing court held that the issues must be limited to the allegations stated in the bill of particulars, stating:

> "None of the given instructions refer in any way to the bill of particulars or to the charge set forth in it. Obviously, the defendants were entitled to have the jury instructed on the issue as to which the prosecution was limited and upon which they were tried, and not upon some other and different issue." 383 Ill. 403, 408, 2 N.E.2d 321, 323.

In *Galvan*, defendants were charged with rape and conspiracy to commit aggravated kidnapping. The reviewing court found plain error arising in the fact that the issues instruction upon the charge of conspiracy was framed in terms of a conspiracy to commit rape and contained no mention of the elements of a conspiracy to commit aggravated kidnapping. In reversing and remanding, the reviewing court said that the jury must be instructed upon the offense charged.

In *Dickerson*, defendant was charged with receiving stolen property. The court determined that an element of that offense was defendant's knowledge of the fact that the property was stolen when he received it. The sum of the instructions, however, would permit the jury to convict defendant upon a separate offense of possession of stolen property. The latter was an offense for which defendant was not charged. The court said:

> "It is elementary, however, that a defendant may be convicted of only the offense with which he is charged, not of another offense with which he might have been charged." (41 Ill. App. 3d 464, 467, 353 N.E.2d 427, 428.)

It was determined that the error required reversal. In the light of the requirements of the statute, we conclude that there was reversible error in giving the issues instruction tendered by the defendant.

●8 The majority of the panel also conclude that any error arising from the trial court's offer to replay, and to the subsequent replaying, of the "tapes" of defendant's telephone conversations with Weathington was harmless beyond a reasonable doubt by reason of the fact that the evidence of guilt was overwhelming. Judge Trapp concludes that upon this record, the trial court abused its discretion for the reason that the jury might readily infer and conclude that the trial court considered such evidence critically important.

No cases have been found which report instances where a trial judge has proffered to review the selected testimony after the jury has retired. The opinion in *People v. Pierre* (1974), 56 Ill. 2d 301, 308 N.E.2d 577, established the rule that it is within the discretion of the judge to determine whether a jury's request to review testimony heard during trial be allowed. A dissenting opinion would adopt the view of the ABA Standards, *Trial by Jury* §5.2 (1968), that the trial judge must grant the

jury's request where the evidence directly relates to an issue before the jury. The question here, however, is *not* whether the court abused its discretion in refusing the jury's request to play the recording, but rather whether there was an abuse of discretion in volunteering and directing the jury's attention to specific prosecution evidence, and inquiring whether it would aid in reaching the jury's verdict.

The latter view is founded upon consideration of the authority of *People v. Baltimore* (1972), 7 Ill. App. 3d 633, 288 N.E.2d 659, and *People v. Golub* (1929), 333 Ill. 554, 165 N.E. 196.

In *Baltimore*, the jury reported that it was unable to reach a verdict in a murder trial after 15 hours of deliberation. The judge inquired whether the jury could reach a verdict without regard to the death penalty. The reviewing court concluded that as a matter of plain error the inquiry might be construed by the jury to indicate an opinion of guilt and for such reason reversed and remanded.

In *Golub*, the jury had been deliberating for 4 hours. The foreman reported that they had not reached a verdict. The trial judge remarked that the jury should have no difficulty in reaching a verdict upon the evidence presented. The opinion states:

> "The juror, as well as the judge, has an independent duty to perform, and he ought to be left free to pronounce his own conviction. A verdict hastened by the action of the judge, however worthy the motive, cannot be the result of that deliberation which the law guarantees. Remarks by a trial judge calculated to effect the rendition of a verdict without affording the jury an opportunity for careful consideration are unwarranted and often lead to great abuse. Whether the error is harmless or prejudicial depends upon the facts of the case." 333 Ill. 554, 561, 165 N.E. 196, 199.

In the context of whether the error was prejudicial or harmless, the opinion noted that the trial judge's remarks did not either expressly, or by implication, indicate that the jury should reach a particular conclusion. The record did not disclose how long the jury deliberated after they had retired a second time.

Here, the testimony concerned events occurring over a period of 11 months. The report of the foreman that the jury was progressing to a verdict negates any suggestion that the jury was then unable to reach a verdict, or was confused or uncertain concerning the evidence. The record discloses that the jury had continued to deliberate some 20 hours after the refusal of the initial request to hear the recording. This suggests that the jury members were not prevented from reaching a verdict because they could not recall or were uncertain about the testimony heard. This record does show that a verdict was returned within 45

minutes following the replaying of the "tapes." As distinguished from the facts in *Golub*, it is reasonable to conclude that the playing of the "tapes" upon the suggestion of the trial judge had a prejudicial consequence.

For the reasons stated herein, the judgment of the trial court is affirmed.

Affirmed.

CRAVEN and REARDON, JJ., concur.

Judgment of the trial court

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
)
vs.) Criminal Nos.
) 74-X-1967 and
LARRY P. CRAMER,) 73-X-159
Defendant.)

And now come the People of the State of Illinois by Assistant Attorney Generals Locher, Burnham and Resch, and said Defendant, Larry P. Cramer, is present in open Court with his Attorney, Donald M. Tennant.

At 2:50 P.M. the jury returns into open Court with the following verdicts:

"We, the jury, find the defendant Larry P. Cramer, Guilty of Solicitation to Commit Murder."

"We, the jury, find the defendant Larry P. Cramer, Guilty of Conspiracy to Commit Murder."

Jury polled at request of Defendant's Attorney.

Judgment entered on the findings of the jury.

April 16, 1975. EDWARD LEE WEIKE, Judge.

Judgment of the Supreme Court of Illinois

Leave to appeal denied, 74 Ill.2d xx (1979), on January 25, 1979. No written decision.

Judgment of the United States District Court

MEMORANDUM OPINION
AND ORDER

The petitioner seeks a writ of habeas corpus, pursuant to 28 U.S.C. Section 2241 and 28 U.S.C. Section 2254. Both the petitioner and the respondent have moved for summary judgment pursuant to Fed. R. Civ. P. 56. No factual issues are in dispute and summary judgment is an appropriate disposition.

The petitioner was convicted on April 16, 1975, in the Circuit Court of Champaign County, Illinois, of solicitation to commit murder and of conspiracy to commit murder. He was sentenced to imprisonment for one to three years. The Petitioner appealed his conviction to the Illinois Appellate Court, Fourth District and on October 12, 1978, that court affirmed his conviction. People v. Cramer, 64 Ill. App.3d 688, 381 N.E.2d 827 (1978). The Illinois Supreme Court denied leave to appeal on January 25, 1979, (No. 51432), and the United States Supreme Court denied certiorari on October 1, 1979. 444 U.S. 828. The petitioner has exhausted his state remedies, a prerequisite to jurisdiction vesting in this court.

Only errors of federal constitutional magnitude may be raised by a state prisoner in federal habeas corpus proceeding. Woods v. Estelle, 547 F.2d 269 (5th Cir. 1977) cert. denied, 434 U.S. 902. Errors or mistakes of law committed in the conduct of a trial are not subject to review by this court unless the errors constitute a denial of fundamental fairness essential to the very concept of justice. Woods v. Estelle, supra. The petitioner, who has the burden of proof in these matters, alleges six such denials.

L.

The petitioner first alleges that he was denied trial by jury and due process of law by the trial court's inquiry directed to the jury during their deliberations as to whether they would find it helpful to listen once more to tape recordings of conversations between the petitioner and his alleged co-conspirator and by replaying those tapes to the jury. Inquiry here is limited to whether the trial judge's actions affected the fundamental fairness of the trial. United States ex rel. Harris v. State of Illinois, 457 F.2d 191 (7th Cir. 1972) cert. denied, 409 U.S. 860. While the state appellate court held the inquiry to be harmless error, an independent determination upon constitutional grounds is required by the application for the writ.

The undisputed facts are that shortly after retiring, the jury requested a transcript of the tape recordings. The request was refused because the transcripts had not been admitted into evidence. The jury then requested that the tapes and a player be sent to the jury room. This request was also refused due to the trial court's concern that the jury might damage or erase the tapes. After the jury had deliberated for 20 hours, the trial judge called the jury into open court in the presence of the prosecution and the defendant and his counsel and inquired whether progress was being made in the deliberations. The response was affirmative. The judge then asked whether replaying the tapes would be helpful to the jury's deliberations. Again, the response was affirmative, and the tapes were played. The jury reached a verdict 45 minutes later.

While the actions of the trial judge in this case must be viewed with grave concern, this court cannot conclude that those actions were a totally unsolicited intrustion nor that they affected the fundamental fairness of the trial. Because the jury heard the tapes replayed, it cannot be concluded that the fundamental fairness of the trial was affected. Had the tapes beeen replayed immediately after the jury made their request the judge would have acted well within his discretion.

Did the timing and the affirmative action of the judge then, in inquiring of the jury, undermine the fairness of the proceeding? It is axiomatic that a jury should be left alone during deliberations and while perhaps the belated inquiry was ill advised, this court cannot conclude under these facts that a constitutional violation occurred. The jury had requested a review of the evidence and been denied it for reasons unrelated to the propriety of the request. The trial judge is vested with the discretion to decide what evidence may be helpful or harmful to the jury's proper deliberations. People v. Bell, 44 Ill. App.3d 185, 357 N.E.2d 1256 (1976). While a prompt decision on such matters is preferable, the trial judge cannot be said to have lost forever his opportunity to reconsider his ruling, especially where it becomes apparent from the length of deliberations and the jury's questions that the jury believes that reviewing certain evidence would aid them in their task.

Unfortunately, neither side has been able to point out relevant authority with similar facts. The case most closely in point is People v. Reynolds, 57 Ill.App.3d 595, 273 N.E.2d 650 (1978), where the curt held that it was not an abuse of discretion for the trial judge initially to deny a jury request to hear testimony again on the ground that it would impede the progress of the case and then, following consultation with counsel, to inquire of the jury what specific testimony they wanted and then grant their request. While the time elapsed between the jury's request and judge's inquiry was greater in this case than in Reynolds, whether the trial judged abused his discretion is not a proper question for this court to decide. The court does conclude that the petitioner's rights to trial by jury and to due process of law were not infringed by the state trial judge's actions.

II.

The petitioner next makes two interrelated arguments: 1) that he was denied due process of law by being convicted on a general verdict of conspiracy when two of the four conspiracy counts against him

were dismissed after trial; and 2) that he was denied trial by jury and due process of law because the jury was never instructed what specific overt acts were alleged or had to be proved under the conspiracy charge. The petitioner's arguments have merit. Each of the four conspiracy counts in the indictment charged the petitioner with conspiracy but each alleged different overt acts performed in furtherance of the conspiracy. At trial, the petitioner contended that the two counts alleging overt acts performed after November 18, 1974, the date the petitioner's alleged co-conspirator became a police informant, should be dismissed because under Illinois law no conspiracy existed after that date. The trial court allowed the case to go to the jury on all four counts of conspiracy and the jury returned a general verdict of guilty of conspiracy. After trial, the judge dismissed two of the four conspiracy ounts as invalid under Illinois law. It is impossible however, to determine upon which counts, or which overt acts, the jury relied. This is true not only because of the form of verdict, but also because the jury was not informed by instructions, by argument or by reading the indictment what specific overt acts were charged.[1] Therefore, not only could the jury

1 The jury was given Illinois Criminal Pattern Jury Instruction #6.04 on conspiracy, which states only, in relevant part, that the State must prove ". . . that an act in furtherance of the agreement was performed by any party to the agreement."

have based its verdict on the overt acts charged in the invalid counts but they also could have relied upon an overt act not even charged. It follows that the conspiracy verdict cannot be sustained.

It is a well settled doctrine of law that a verdict must be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected. Yates v. United States, 354 U.S. 298 (1957); Williams v. North Carolina, 317 U.S. 287 (1942); Stromberg v. California, 283 U.S. 359 (1931). In Yates, the jury had returned a general verdict of guilty of conspiracy to advocate violent overthrow of the government or to organize the Communist Party. The Court determined

that the statute of limitations had run on the "organizing" charge, but was unable to tell either (1) upon which provision of the statute the jury had relied, or (2) whether the overt act found by the jury was in furtherance of the advocacy or the organizing provision. The verdict, therefore, was set aside. Similarly, in Williams, the case was tried and submitted to the jury to two theories, one of which later was held invalid. The verdict did not specify the theory relied upon and so tthe conviction was overturned. In Stromberg, a general verdict was returned under a statute prohibiting three different activities. Later one prohibition was held to be unconstitutional. The jury was instructed that a verdict could be returned on any activity independently considered. The state court held that the verdict could be sustained if any one of three possible bases was valid. The Supreme Court reversed the state court. The Court held that where one provision under the statute was unlawful, the conviction could not be upheld if it was impossible to say under which clause of the statute the conviction was obtained.

In this case it is impossible to tell whether the jury found an overt act under the valid or the invalid counts, or even whether the verdict was based upon an overt act that had been charged. The general verdict of guilty of conspiracy cannot be upheld. It is a denial of due process.

III.

The petitioner's concurrent sentence will stand, however, if his conviction under the solicitation count is found to be valid. The petitioner argues that he was denied due process of law and his rights under the Sixth Amendment in being tried and convicted on an indictment for solicitation which did not state a crime because it pleaded the statutory language rather than the actual words or substance of the words used by the petitioner. The petitioner's argument is without merit.

As a general proposition, the sufficiency of an indictment is not reviewable in habeas corpus proceedings. Knewel v. Eagan, 268 U.S. 442 (1925). Habeas corpus can be invoked with respect to an indictment only where it is so fatally defective that under no circumstances could a valid conviction result from facts provable under that indictment. Johnson v. Beto, 383 F.2d 197 (5th Cir. 1968).

In the indictment under which the petitioner was tried, solicitation was charged in the statutory language that the petitioner "did request" or "did encourage" Charles O. Weathington to murder Judy Cramer.[2]

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2 Ill. Rev. Stat., ch 38 Section 8-1 (1977) provides in relevant part that "a person commits solicitation when with intent that an offense be committed he commands, encourages, or requests another to commit that offense."

The petitioner argues that a charge of solicitation is analogous to a charge of perjury in that it can be committed only by the use of words. Therefore, he claims, since words are both the offense and the means of committing the offense, a charge of solicitation must state the words used, either verbatim or in substance.

In People v. Powell, 72 Ill.2d 50, 377 N.E.2d 803, cert. denied, 440 U.S. 907 (1979), the court upheld an indictment for solicitation to obstruct justice, stating that an indictment which charges an offense in the language of the statute is sufficient when the statute itself apprises the defendant with reasonable certainty of the precise offense charged. In People v. George, 67 Ill.App.3d 102, 384 N.E.2d 377 (1978), the court upheld an indictment for solicitation which charged that the defendant requested a certain individual "to arrange for" a murder. The court held that the sufficiency of an indictment is tested by determining whether it contains the elements of the offense intended to be charged, sufficiently apprises the defendant of the nature of the offense so as to enable him to prepare a defense, and sufficiently identifies the specific offense to protect a defendant from double jeopardy.

It is clear that the precise words allegedly used by the petitioner in this case were not necessary to inform him of the solicitation charge against him, nor to enable him to prepare a defense, nor to identify the offense for use in any future plea in bar. The prosecution's case did not require proof that any particular words were spoken by the petitioner. The indictment cannot be characterized as "so fatally defective that under no circumstances could a valid conviction result from facts provable under the indictment." Johnson v. Beto, 385 F.2d at 198, and it cannot be the basis for habeas corpus relief.

IV.

The petitioner next alleges that he was denied due process of law by the state's concealment of evidence favorable to the defense. The petitioner misstates the constitutional test in a habeas corpus proceeding. Counsel's proper adherence to discovery rules is not a matter of concern in a habeas corpus proceeding. It deals with the petitioner's right to a fair trial mandated in the due process clause of the Fourteenth Amendment. As the United States Supreme Court stated in United States v. Agurs, 427 U.S. 97 (1976), "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Id. at 109-110.

The state does not violate the constitutional duty of disclosure of exculpatory information unless the omission is of such importance that it denies the defendant a fair trial. The Agurs court held that,

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is not justification for a

> new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. Id. at 112-113. (Emphasis added.)

The petitioner alleges that the state concealed the following exculpatory material relating to the prosecution witness, Patty Cozad:

1. that the witness testified under an alias; that her real name is "Patty Stafford.";
2. that the state failed to reveal her address, despite the petitioner's repeated requests;
3. that she used narcotics;
4. that she had a felony charge for possession of narcotics pending in the same court at the time of her testimony;
5. that she had recently been convicted of a crime invovling dishonesty;
6. that a month prior to her testimony she sold narcotics to agents of the Illinois Bureau of Investigation, one of whom was the chief investigator in the petitioner's case;
7. that she had a drug-related connection to Mary Johnson, the woman with whom the petitioner was allegedly having an adulterous affair.

The substance of Cozad's testimony was that she and Weathington, the petitioner's alleged co-conspirator, were in Chicago together on September 26 and 27, 1974, and that Weathington purchased a knife there. Her testimony tended to corroborate that of the prosecution's chief witness, Weathington. The petitioner says that Cozad's testimony lent unwarranted credibility to Weathington and that concealing the information impeded both the impeachment of Cozad and the defense investigation of any concerted action among Johnson, Cozad, and Weathington directed against petitioner. The state disclaims any knowledge concerning the petitioner's claims in #1, #4, #5, and #6.

Assuming, arguendo, that the prosecution had knowledge of each of the allegedly exculpatory items of information, the court cannot conclude that, even considered in their totality, they "create a reasonable doubt that did not otherwise exist" of the petitioner's guilt. United States v. Agurs, supra; United

States ex rel. Moore v. Brierton, 560 F.2d 288 (7th Cir. 1977). The testimony of Patty Cozad was cumulative and tangential. The events she described had already been testified to by the chief prosecution witness, Weathington. Cozad was not an eyewitness to the alleged solicitation or to any concerted activity between the petitioner and Weathington and gave no testimony as to those events. No claim is made that her testimony was perjured; nor does it appear that Ms. Cozad was presented in a totally innocent light. She testified that, on an overnight trip, she accompanied a man to Chicago who was planning to help murder another man's wife. The court cannot conclude that a further discrediting of her character would have been of such import as to create new doubt of the petitioner's guilt. Turning specifically to the request for Ms. Cozad's address, while the prosecution failed to respond to the request, the petitioner again has made no showing that the address would have tended to exculpate him or to affect the outcome of the trial. The court cannot conclude that the address was material to the issue of the petitioner's guilt. Brady v. Maryland, 373 U.S. 83 (1963). No constitutional violation resulted from concealment of exculpatory evidence.

V.

Finally, the petitioner contends that he was denied due process of law by the cumulative effect of erroneous evidentiary rulings. The federal courts possess only limited authority to review such evidentiary rulings in a habeas corpus proceeding by a state prisoner. Nordskog v. Wainwright, 546 F.2d 69 (5th Cir. 1977). This court cannot interfere with a state court's evidentiary rulings unless the errors involved reasonably can be said to amount to a deprivation of constitutional rights. United States ex rel. Harris v. State of Illinois, 457 F.2d 191 (7th Cir. 1972), cert. denied 409 U.S. 860. Before mistakes in the admission of evidence rise to a constitutional plane, they must be material in the sense of being a crucial, critical, highly significant factor in the outcome of the case, Anderson v. Maggio, 555 F.2d 447 (5th Cir. 1977). Habeas corpus is not a proper remedy because

the state court's challenged conduct would have led to reversal if the defendant had been tried in the federal system, nor because the state evidentiary rules have been violated. Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977).

The petitioner has alleged some nine erroneous evidentiary rulings by the state trial court. First, he claims that the court admitted testimony that he accepted and smoked marijuana from Weathington as collateral for a loan. The trial court admitted the testimony on the basis of People v. Billburg, 314 Ill. 182 (1924), which held that in a conspiracy case some latitude is permitted in the proof to show the relationship of the parties and the object and purpose of the conspiracy. The trial court gave a limiting instruction that the evidence was admitted only to show the relationship between the petitioner and Weathington. The state appellate court upheld the ruling of the trial court,

> It (the evidence) did not concern wholly independent and unrelated conduct clearly apart from the offenses charged. The transaction concerning a loan 'secured' by marijuana was the point from which defendant opened discussion or suggestion of the acts constituting the objective of the conspiracy. That transaction was of a nature that might suggest to defendant that Weathington might be receptive to the proposals and did, as the trial judge concluded, explain the relationship between the parties.

While it is possible to characterize the evidence as irrelevant, it cannot be characterized as a "curcial, critical, highly significant factor." Anderson v. Maggio, supra. No error of constitutional magnitude was committed by its admission.

Second, the petitioner argues that the state court erroneously admitted Weathington's testimony that the petitioner was "messing around" with another woman, that he contemplated killing other people, and that a complaint was pending against him before the Illinois State Bar Association. The state counters that evidence of the petitioner's alleged adulterous affair was relevant to prove motive.

Apparently the testimony was admitted on this basis. Later, when the state failed to follow up the motive issue, the judge instructed the jury that any evidence of the petitioner's immoral conduct "was presented for the limited purpose of showing the relationship between the defendant and Mr. Weathington." The Illinois Appellate Court again upheld the trial court,

> The testimony concerning the estramarital affair originated in statements by defendant to Weathington explaining the cause for delay in the further discussion of the plans for carrying out the conspiracy. It was presented to the jury in the context of the court of the developing conspiracy, rather than introduced as wholly extraneous to the relation between the parties.

The same analysis applies to Weathington's testimony that at one point during the conspiracy it was contemplated that he kill two additional persons, and to Weathington's testimony that the plan had to be delayed dur to a conplaint filed with the bar association against the petitioner by the mother-in-law of the petitioner's paramour. Again, any error on the part of the trial court, dissipated as it was by giving a limiting instruction, did not negate the fundamental fairness of the trial process. The allegedly prejudicial testimony was inextricably linked to proof of the conspiracy as it developed.

Third, the trial court, erred, the petitioner asserts, in refusing to exclude taped portions of conversations between the petitioner and Weathington of the feasibility of killing other people, of potential violations by the petitioner of his clients' confidences, and of a hypothetical pregnancy of the petitioner's lover. The testimony regarding other killings is discussed above. While the remaining portions of the taped conversations preperly might have been excluded, the evidence was not material or prejudicial in a constitutional sense and was linked to the proof of conspiracy.

The petitioner next raises the point that the trial judge permitted the state to contradict its

bill of particulars through the testimony of a state trooper and later instructed the jury to disregard that evidence. The evidence was relevant to the conviction under the conspiracy counts and does not relate to the solicitation charge.

The remaining objections are trivial and do not, either when viewed individually or considered in the totality of the trial, merit federal habeas relief. While the petitioner may not have enjoyed an error-free trial at the state level, the cumulative effect of any erroneous rulings by the trial court did not deprive the petitioner of due process of law within the meaning of the Fourteenth Amendment.

WRIT DENIED.

Summary judgment in favor of the respondent and against the petitioner.

ENTER this 27th day of August, 1980.

Harold A. Baker
United States District Judge

Opinion of the District Court on Rehearing

Supplemental Memorandum Opinion and Order

Both the petitioner and the respondent have timely moved for reconsideration of the court's order of August 27, 1980. After rehearing and reconsideration the court confesses that it was error to fail to order the Writ to issue forbidding detention of the petitioner under the conviction for conspiracy. Under the rationale of Benton v. Maryland, 395 U.S. 784 (1968) disapproving the "concurrent sentence doctrine" and the principles announced in Peyton v. Rowe, 391 U.S. 54 (1967) concerning the availability of habeas corpus in cases where a consecutive sentence is challenged this court should not fail to set aside the conviction which came about through a denial of due process of law even though a valid concurrent conviction exists. Also persuasive is the discussion of potential furture harm from unconditional acts in the cases of Preiser v. Rodriguez, 411 U.S. 475 (1972) and Carafas v. LaVallee, 391 U.S. 234 (1967). See also Fiswick v. United States, 329 U.S. 211, 222 (1946) (service of sentence did not

render validity of conviction moot because of possible future consequences flowing from the invalid conviction); Sciberras v. United States, 404 F.2d 247 (10th Cir. 1968) (habeas corpus available remedy to attack concurrent sentence).

With regard to the petitioner's renewed contentions concerning the trial judge ordering the replaying of certain tape recordings that had been received in evidence the court relies on its reasons stated in the August 27, 1980 order and would add: See also United States v. DeStefano, 476 F.2d 324, 337 (7th Cir. 1973) (propriety of Allen charge upheld when jury has not indicated it was deadlocked.)

In all other respects, the court adheres to its August 27, 1980 order.

United States v. Fassoulis, 445 F.2d 13 (5th Cir. 1971) relied upon by respondent to uphold the conspiracy conviction is not in point. Fassoulis involved a one count conspiracy charge with overt acts for which convictions of substantive offenses were also obtained. Cramer had four conspiracy counts with separate overt acts charged. This court cannot determine which count or which act, including the solicitation, was the basis of the jury's general verdict in the conspiracy conviction.

It is therefore ordered that the petitioner's motion for reconsideration is allowed in part and denied in part. The respondent's motion for reconsideration is denied.

Summary judgment in favor the of the petitioner and against the respondent on the issues relating to the conspiracy conviction. Summary judgment in favor of the respondent and against the petitioner on the issues relating to the solicitation conviction.

It is further ordered that a writ of habeas corpus issue as prayed insofar, but only insofar, as the petitioner's conviction for conspiracy to commit murder is concerned. The respondent is commanded forthwith to discharge the petitioner, Larry P. Cramer, from further detention or commitment or imprisonment by reason of the conviction of the crime of conspiracy to commit murder in the Circuit Court of Champaign County, Illinois.

It is further ordered that in all other respects the petition for writ of habeas corpus is denied and the petitioner is remanded to the custody of the respondent, or his authorized representative, for further disposition in accordance with law.

ENTER this 24th day of October, 1980.

Harold A. Baker
United States District Judge

Judgment of the Court of Appeals June 30, 1982

This cause was heard on the record from the United States District Court for the Central District of Illinois, Danville Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

Judgment of the Court of Appeals August 13, 1982

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Petitioner-Appellant, a majority of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2545

LARRY P. CRAMER,

Petitioner-Appellant,

v.

TYRONE C. FAHNER, Attorney General of the State of Illinois,

Respondent-Appellee.

No. 80-2757

TYRONE C. FAHNER, Attorney General of the State of Illinois,

Respondent and Cross-Appellant,

v.

LARRY P. CRAMER,

Petitioner and Cross-Appellee.

Appeal from the United States District Court for the Central District of Illinois, Danville Division.
No. 79-2238—Harold A. Baker, *Judge.*

ARGUED APRIL 9, 1981—DECIDED JUNE 30, 1982

Before CUMMINGS, *Chief Judge*,* SWYGERT, *Circuit Judge*,** and HOFFMAN, *Senior District Judge*.***

HOFFMAN, *Senior District Judge*. Petitioner appeals the denial by the district court of a petition for writ of habeas corpus on his conviction in an Illinois state court for solicitation to commit murder. Respondent, State of Illinois, cross-appeals the grant of the writ on petitioner's conviction for conspiracy to commit murder. We affirm both actions on summary judgment by the lower court.

Petitioner, an Illinois attorney, was indicted on ten counts of conspiracy and solicitation, based on having planned with a former client from February to November, 1974, to have petitioner's wife murdered. Petitioner did not testify at trial; the most important evidence against him was the testimony of Weathington, the former client, and tapes of conversations between Weathington and petitioner, made after Weathington went to the police on November 18, 1974. Other prosecution witnesses included agents of the Illinois Bureau of Investigation (I.B.I.) and Patty Cozad, who testified that she accompanied Weathington on a trip to Chicago, where Weathington met petitioner and bought a knife.

After a general guilty verdict was returned on the four conspiracy and six solicitation counts, the state trial court granted petitioner's motion to dismiss the two conspiracy counts—three and ten—that were based on overt acts on December 11, after the sole co-conspirator had gone to the police, at which point the conspiracy ended

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* Circuit Judge Sprecher heard the oral argument and voted to affirm. He also had concurred in Judge Hoffman's suggested opinion but died before reviewing Judge Swygert's partial dissent. He was succeeded on the panel by Chief Judge Cummings.

** At the time of oral argument, the Honorable Luther M. Swygert was a circuit judge in active service; he assumed senior status on August 1, 1981.

*** The Honorable Walter E. Hoffman, Senior District Judge of the District of Virginia, is sitting by designation.

by law. The trial court, however, rejected petitioner's argument that the jury could have based its general verdict on the two invalid charges rather than the two alleging overt acts before November 18. The conviction was upheld by the Illinois Appellate Court. *People v. Cramer*, 64 Ill. App. 3d 688, 381 N.E.2d 827 (1978). Leave to appeal was denied by the Illinois Supreme Court on January 25, 1979 (No. 51432), and the Supreme Court of the United States denied certiorari, 444 U.S. 828 (1979).

Petitioner's collateral attack was more successful: the district court granted the writ as to the conspiracy conviction because petitioner's right to due process was violated by the possibility that the jury based its verdict on overt acts in the invalid conspiracy counts. The court initially determined that the writ should not issue because petitioner also was sentenced to a concurrent one-to-three year term for solicitation. *Cramer v. Scott*, No. 79-2238 (C.D. Ill. Aug. 27, 1980). The court, on reconsideration, agreed to issue the writ despite the existence of a valid concurrent sentence. *Id.* (C.D. Ill. Oct. 24, 1980). The State of Illinois cross-appeals the issuance of the writ as to the conspiracy conviction.

In addition to respondent's cross-appeal, this court must consider four issues raised by petitioner: (1) Was the solicitation indictment unconstitutionally vague because it merely tracked the language of the Illinois statute of "encouraging" and "requesting," rather than setting forth the very words used to solicit Weathington? (2) Did the state conceal certain evidence that would have allowed petitioner to impeach Patty Cozad, whose testimony petitioner claims was vital to the defense? (3) Was evidence of other crimes and wrongful acts by petitioner erroneously admitted and, if so, did it so prejudice petitioner as to make his trial fundamentally unfair? (4) Did the actions of the trial judge, in offering to replay and replaying tapes containing damaging evidence against petitioner many hours after the jury had twice requested the evidence, impermissibly intrude on the jury's function and coerce a guilty verdict?

VALIDITY OF CONSPIRACY CONVICTION

A. Verdict Could Have Been Based On Invalid Counts

Petitioner made two arguments to the Illinois Appellate Court, one statutory and one constitutional, as to why his conspiracy conviction should not stand, which were, respectively, that the trial court gave erroneous instruction under Illinois law and that the jury might have based its guilty verdict on the overt acts in the invalid counts. The Illinois court agreed that one conspiracy instruction was an erroneous statement of Illinois law,[1] though harmless error in light of the overwhelming evidence of guilt, but failed to address the constitutional issue. The federal court, however, upon consideration of the constitutional argument, determined that petitioner's due process rights were violated because the jury's general verdict could have been based on the invalid counts later dismissed. We agree that, because we are unable to tell whether the jury based its verdict on the valid or invalid counts, the general conspiracy conviction was unconstitutional. Where a verdict is supportable on one ground but not another, and it is impossible to tell which grounds the jury selected, the conviction is unconstitutional. *Stromberg v. California*, 283 U.S. 359, 368 (1931). Respondent distinguishes the invalidation of the conviction in *Stromberg* as being grounded on the fact that one of the three possible bases for conviction under

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[1] Illinois Pattern Instruction Criminal No. 6.04 only requires proof "[t]hat an act in furtherance" was performed, whereas the statute itself requires that an act in furtherance be alleged and proved, which the Illinois majority saw as meaning that the same act that was alleged in the indictment must be proved. *Cramer*, *supra*, at 833. Respondent reargued that issue, already disposed of by the Illinois court, on this appeal, relying principally on cases interpreting the federal conspiracy statute as not requiring proof of the same overt act alleged in the indictment. Not only is respondent's reliance on the inapposite federal cases misplaced, but we will not disturb the Illinois Appellate Court's interpretation of its own state law.

the statute was *unconstitutional*, whereas here two possible bases for conviction were merely invalid. It is true that in *Williams v. North Carolina*, 317 U.S. 287, 291-92 (1942), just as in *Stromberg*, one of the two theories under which the case was submitted to the jury was unconstitutional and therefore the judgment could not be sustained. However, in *Yates v. United States*, 354 U.S. 298 (1957), the ground on which the verdict could have rested, for which it was set aside, was legally invalid rather than unconstitutional. A general guilty verdict was returned based on violation of a statute that forbad advocating the violent overthrow of the government or organizing the Communist Party. The conviction was set aside, not because one of the prohibitions was unconstitutional, but because the three-year statute of limitations had run on the organizing charge, since the Party was first organized in this country in 1945. Given the lack of clarity in the jury instructions, the Court wrote, "we have no way of knowing whether the overt act found by the jury was one it believed to be in furtherance of the 'advocacy' rather than the 'organizing' objective of the alleged conspiracy." Similarly, this conspiracy conviction must be set aside. *Id.* at 311-12.

B. Inapplicability Of Concurrent Sentence Doctrine

We likewise uphold Judge Baker's decision to issue the writ as to the conspiracy conviction, despite the existence of a valid concurrent sentence on the solicitation conviction, for the reasons he set out in his supplemental opinion and order: the principles behind the availability of habeas for consecutive sentences, one of which is scheduled to be served in the future, as set out in *Peyton v. Rowe*, 391 U.S. 54 (1968); the disapproval of the so-called "concurrent sentence" doctrine in *Benton v. Maryland*, 395 U.S. 784, 787-93 (1969); and the availability of habeas corpus even after a sentence is served to avoid future consequences from an invalid conviction, as explained in *United States v. Fiswick*, 329 U.S. 211, 222 (1946). The circuits have gone both ways in examining

the continuing validity of the "concurrent sentence" doctrine. *Compare Sciberras v. United States*, 404 F.2d 247, 249-50 (10th Cir. 1968) (Habeas remedy is available to attack a concurrent sentence), with *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *Van Geldern v. Field*, 498 F.2d 400, 403-04 (9th Cir. 1974); *United States ex rel. Weems v. Follette*, 414 F.2d 417, 418-19 (2d Cir. 1969), *cert. denied*, 397 U.S. 950 (1970) (The continuing validity of the "concurrent sentence" doctrine was upheld).

The Supreme Court has explained that the concurrent sentence doctrine "cannot be taken to state a jurisdictional rule", *Benton, supra*, at 790, based on lack of a justiciable case or controversy, although it "may have some continuing validity as a rule of judicial convenience," *id.* at 791, holding merely that "there is no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed," *id.* The Court implied that a habeas court may consider constitutional attack on one conviction, even though a petitioner is serving a concurrent sentence on a valid second conviction, if there is a possibility of adverse collateral consequences from the existence of the invalid conviction, *id.* at 790-91, but, because the state court did not apply the doctrine, the Supreme Court found it "unnecessary to resolve [the] dispute" as to whether "the concurrent sentence doctrine survives as a rule of judicial convenience". *Id.* at 792.

Essentially, the state of the law now is that it is in the discretion of the habeas court whether it will examine the validity of one conviction, despite a valid second conviction for which petitioner is serving a concurrent sentence, or refuse to pass on the constitutionality of the conviction, based on the court's assessment of the collateral effect of the conviction. "The proper exercise of this discretion depends upon the degree of prejudice that may be attributed to the challenged conviction." *Van Geldern, supra*, at 403. The Fourth Circuit sees the application of the concurrent sentence rule, after *Benton*, as "restricted to situations where there is no substantial

possibility that the unreviewed conviction will adversely affect the defendant's right to parole or expose him to a substantial risk of adverse collateral consequences." *Truong Dinh Hung, supra*, at 931.[2]

Judge Baker did not specifically set out in his supplemental opinion whether he reconsidered and ordered the writ to issue because of the danger of collateral consequences to petitioner, but we read his reliance on "the rationale of *Benton v. Maryland* . . . disapproving the 'concurrent sentence doctrine' . . ." as indicating that he followed the *Benton* principle of looking to the possibility of consequences flowing from a second conviction. We therefore uphold his discretionary grant of the writ to avoid the collateral effects of a second conviction.

SOLICITATION COUNTS

Petitioner's fourfold attack on his solicitations conviction, to be successful, must go beyond merely proving that the alleged trial errors violated Illinois' own law and procedural rules and show that the errors rose to the constitutional level, either by making his trial so fundamentally unfair as to deny him due process or by abridging a specific constitutional guarantee, such as the right to notice of the charges against him, which is violated by a constitutionally vague indictment. *United States ex rel. Bibbs v. Twomey*, 506 F.2d 1220, 1222-23 (7th Cir. 1974), *appeal after remand*, 538 F.2d 151 (1976) (en banc), *cert. denied*, 429 U.S. 1102 (1977).

Petitioner's first attack on his conviction is aimed at the six solicitation counts which he claims were unconstitutionally vague for failure to include the very words

[2] Judge Winter, writing for the majority on all other issues, was in the minority in disapproving the "concurrent sentence" doctrine. *Id.* at 922-23. He insisted that Judge Russell's dissent, *id.* at 931-32, in which Judge Hall concurred, was in direct contradiction to an earlier Fourth Circuit opinion granting the writ where a valid concurrent sentence existed, *Close v. United States*, 450 F.2d 152, 155 (4th Cir. 1971), *cert. denied*, 405 U.S. 1068 (1972).

or the substance of the words used to solicit Weathington to murder petitioner's wife. The indictment tracked the language of the Illinois statute: petitioner was accused of encouraging and requesting Weathington to murder his wife. Petitioner contends that because Illinois demands that a perjury indictment set out the operative words, *People v. Aud*, 511 Ill. 2d 368, 288 N.E. 2d 453 (1972), the same should hold true for solicitation, the essence of which he claims is also the words spoken. But Illinois itself has twice upheld solicitation indictments stated in the language of the statute. *People v. Powell*, 72 Ill.2d 50, 377 N.E.2d 803 (1978), *cert. denied*, 440 U.S. 907 (1979); *People v. George*, 67 Ill. App. 3d 102, 384 N.E. 2d 377 (1978). Even if the Illinois court was wrong in making this distinction under Illinois law, it is not our role on habeas corpus to set aside a state court's interpretation of its own law. *United States ex rel. Burnett v. People of Illinois*, 619 F.2d 668, 671 (7th Cir.), *cert. denied*, 449 U.S. 880 (1980). Petitioner attempts to distinguish those two cases by the fact that the solicitation here was based on conversations that took place over a nine-month period, but that is all the more reason for not demanding that the State set out the very words used to solicit. The offense of perjury is readily distinguishable from solicitation; the former is directed to a fixed statement, the latter at times to an entire conversation. With perjury, the only issue is whether or not it is true; solicitation, on the other hand, may be based on lengthy detailed conversations, some of which may be direct but many portions of which may consist of subtle, indirect inducements, the words of which are meaningless when taken out of context.

Illinois' requirements for an indictment are that it (1) apprise the defendant with reasonable certainty of the nature of the offense in order to allow him to prepare a defense; (2) include the elements of the offense; and (3) sufficiently identify the particular offense committed so as to protect defendant from double jeopardy. *George*, *supra*; *see also, Powell*, *supra*.

As the District Court here pointed out, "It has been uniformly held by [the Supreme] Court that the suffi-

ciency of an indictment cannot be reviewed in habeas corpus proceedings," *Knewel v. Egan*, 268 U.S. 442 (1925). Relief should only be granted where the indictment is "so fatally defective that under no circumstances could a valid conviction result from facts provable under the indictment." *Johnson v. Beto*, 383 F.2d 197, 198 (5th Cir.), *cert. denied*, 393 U.S. 868 (1968). Such a statement cannot be made of the solicitation counts against petitioner.

CONCEALMENT OF WITNESS INFORMATION

Petitioner next argues that the prosecution concealed impeachment information about Patty Cozad, whom he views as a key prosecution witness, and thus denied him his right to confront the witness against him. Whether the trial court violated Illinois' procedural rules about revealing such information is not an issue on habeas corpus; we need only determine whether the state denied petitioner due process by concealing evidence that was "material" in a constitutional sense.

We reject respondent's first two defenses—that the accused did not make a specific request for impeachment material against Cozad and that the prosecution itself was not aware of any material the police had that could have been used to impeach Patty Cozad. For purposes of determining the prosecution's duty to reveal material favorable to an accused under *Brady v. Maryland*, 373 U.S. 83 (1963), "it is not fatal to petitioner's contention that his attorney made no request for the testimony", and knowledge of the police should be imputed to the prosecution. *Clarke v. Burke*, 440 F.2d 853, 855 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972). However, where, as here, there is no knowing use of false evidence by the prosecution, petitioner must show a substantially higher probability that disclosure would have altered the result. *Id.* That is, absent "active misconduct on the part of the prosecution, the 'suppressed' evidence must be 'vital and material' to furnish grounds for the reversal of a conviction." *Id.*

The petitioner's allegation is that the state concealed Patty Cozad's address, real name, use of narcotics, and

pending state charges against her for a narcotics sale to the chief investigator in petitioner's case. Even if this information would have served to impeach Patty Cozad's testimony, that testimony was not vital to the state's case. Her testimony merely served to corroborate Weathington's claim to have been in Chicago on September 26 and 27, 1974, at the same time petitioner was at the Palmer House in that city with his wife for a legal meeting. Cozad testified that she accompanied Weathington to Chicago on those dates and knew what he did and where he went on those dates, including a trip to buy a knife, one of the overt acts alleged in the indictment. We agree with the district court that, because she "was not an eye-witness to the alleged solicitation or to any concerted activity between the petitioner and Weathington and gave no testimony as to those events," her testimony was "cumulative and tangential."

The standard for what is "material" in a constitutional sense was set out by the Supreme Court in the leading case of *United States v. Agurs*, 427 U.S. 97, 109-110 (1976): "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." The omitted evidence must create "a reasonable doubt that did not otherwise exist," evaluated "in the context of the entire record." *Id.* at 112. If, eliminating the additional evidence, there is still no reasonable doubt of guilt, the trial was fair and the writ should not issue. *Id.* at 112-13. It would be "far too restrictive on the state[s]" for a habeas court to vacate a state conviction simply because suppressed evidence, such as a police report, "*might* have led the jury to entertain a reasonable doubt as to his guilt." *Ross v. State of Texas*, 474 F.2d 1150, 1152-53 (5th Cir.), *cert. denied*, 414 U.S. 850 (1973). *See also United States ex rel. Moore v. Brierton*, 560 F.2d 288, 292 (7th Cir. 1977), *cert. denied*, 434 U.S. 1088 (1978) (Where a demand is not made or is made in general terms, such as for all statements from all witnesses to the police or all probation reports on 14 people, the standard is whether the evidence creates a reasonable doubt that did not otherwise exist, evaluated in the light of the entire record).

Because no reasonable doubt exists of petitioner's guilt even without Patty Cozad's testimony, the failure to reveal information that might have been used to impeach her was not a deprivation of petitioner's constitutional rights.

ERRONEOUSLY ADMITTED EVIDENCE

Petitioner protests the admission of evidence that he had used marijuana, committed adultery, had bar association complaints filed against him, and solicited the murder of other people. The evidence came up in Weathington's direct testimony, on the tapes, and on cross-examination of Mrs. Cramer.

On habeas, mere failures to observe Illinois evidentiary rules, without more, will not occasion the issuance of a writ. However, petitioner's claim is that the cumulative effect of the allegedly erroneous rulings was so prejudicial that it created a danger that he was convicted for those other acts, rather than for the crimes for which he was on trial. Evidence of other wrongs is admissible under Illinois law if relevant to an issue other than character or propensity to commit the crime charged. The Illinois Appellate Court found the evidence of marijuana, adultery, and bar association complaints relevant to the developing course of conspiracy, a conclusion with which the federal habeas court agreed.

Weathington's testimony on marijuana was that he went to the office of petitioner, his former attorney, to request a $20 loan. When asked what collateral he had, he said, he handed over the marijuana, whereupon petitioner smoked some in his pipe. Reasoning that Illinois allows some latitute in proof of the *relationship* of co-conspirators and the purpose of the conspiracy, *People v. Billburg*, 314 Ill. 182 (1924), the trial court admitted the evidence. We agree with what the Illinois Appellate Court wrote in upholding that admission, *Cramer*, *supra*, at 832:

> The evidence at issue here was clearly intertwined with the negotiation and progress of the conspiracy. It did not concern wholly independent and unre-

> lated conduct clearly apart from the offenses charged. The transaction concerning a loan 'secured' by marijuana was the point from which defendant opened discussion or suggestion of the acts constituting the objective of the conspiracy. That transaction was of a nature that might suggest to defendant that Weathington would be receptive to the proposals and did, as the trial judge concluded, explain the relationship between the parties.

The adultery, bar complaints, and solicitation of other murders came up in Weathington's testimony when he quoted petitioner as saying that he could not press forward at that time with the plans to kill his wife because of pressure he was under from another quarter. Weathington's version of what petitioner told him was that petitioner had had an affair with the wife of a client and the woman's mother-in-law, upon learning of the liaison, complained to the bar association. At one point petitioner said that he might need to order two more murders if the woman continued to press the complaints. The prosecution told the trial judge that adultery was relevant to show petitioner's motive to solicit murder. Although the prosecution failed later to make the tie between adultery and motive, we agree with the view of the Illinois Appellate Court that the adultery evidence was nevertheless admissible as relevant to the *delay* in carrying out petitioner's plan:

> The testimony concerning the extramarital affair originated in statements by defendant to Weathington explaining the cause for delay in the further discussion of the plan for carrying out the conspiracy. It was presented to the jury in the context of the course of the developing conspiracy, rather than introduced as wholly extraneous to the relation between the parties.

Id. In like manner, the bar association complaints were part of petitioner's explanation to Weathington of the delay in the plans, and the petitioner's mention of other killings was part of his explanation to Weathington at the time as to how he would deal with the adultery and

bar complaint problems. In addition, the killings came up in the context of a discussion of a possible hit man to kill Mrs. Cramer.

Petitioner's argument that references to these acts should have been excised from the above-described tapes analogizes to the rule requiring deletion of references to other crimes from a confession introduced at trial. *Cf. United States ex rel. Floyd v. Williams*, 367 F.2d 990 (2d Cir. 1966) (Where judge gave no curative instruction, unedited confession's admission was error). There is, however, a practical difference between the two: whereas a written confession can be cut without harming its logic or continuity, excisions from tapes of conversations will often render them disjointed and meaningless.

The trial court should not have allowed prolonged questioning on cross-examination of petitioner's wife on her knowledge of petitioner's adultery and bar association problems, which the trial judge belatedly stopped after her repeated protests of ignorance. For three reasons, however, we do not find that error to present the occasion for the issuance of a writ. First, the judge's limiting instructions at the close of the prosecution's case-in-chief that "any evidence received in regards to the use of marijuana or immoral conduct was presented for the limited purpose of showing the relationship between the defendant and Mr. Weathington," and his instructions after closing arguments for the jury to consider such evidence only for the limited purposes for which it was allowed effectively cured any prejudice from erroneously admitted evidence.[3] Proper instruc-

[3] Petitioner argued that the instructions should have been given at the moment the allegedly inadmissible evidence was given. We do not necessarily agree with the Illinois court's answer to that argument that "orally instructing at the close of all prosecution evidence would more effectively impress than rulings scattered throughout several days of testimony." *Id.* However, the cases we cite, *see* textual discussion *infra*, make clear that proper instructions, given at the time the evidence is admitted or later, are usually effective.

tions will usually suffice to correct damage from any erroneously admitted evidence or evidence admissible only for a limited purpose. *United States v. Castaldi*, 453 F.2d 506, 511-12, (7th Cir. 1971), *cert. denied*, 405 U.S. 992 (1972); *United States v. Teller*, 412 F.2d 374, 380 (7th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971). *See also, United States v. Quinn*, 398 F.2d 298, 303 (7th Cir.), *cert. denied*, 393 U.S. 983 (1968).

The second reason for not granting a writ for any errors in admitting this evidence is the limitation on the role of a federal habeas court in examining such errors. A habeas court should not invalidate a state conviction unless the erroneously admitted evidence so tainted the trial that it was fundamentally unfair. Although the trial was not conducted particularly well at the state level, we do not believe petitioner was denied due process. It is not the role of a federal habeas court to correct state-court errors; the state's administration should not be interfered with unless a federal right is violated. *McGee v. Eyman*, 310 F.2d 230, 232 (9th Cir.), *motion to file petition for writ denied*, 371 U.S. 917 (1962). Unless the claimed error amounted to a fundamental defect so great that it inherently resulted in a complete miscarriage of justice, the conviction should stand. *Jackson v. Hutto*, 508 F.2d 890, 891 (8th Cir. 1975). State evidentiary rulings should rarely be the cause of habeas review. *Buder v. Bell*, 306 F. 2d 71, 75-76 (6th Cir. 1962) (Admission of evidence is "peculiarly within the province of the trial judge," who has "wide latitude and discretion in such matters" and errors that would warrant reversal on direct appeal should "rarely . . . warrant a collateral attack on a judgment of conviction as being a denial of due process of law."). *Accord, Maggitt v. Wyrick*, 533 F.2d 383, 385 (8th Cir.), *cert. denied*, 429 U.S. 898 (1976); *United States ex rel. Choice v. Brierley*, 460 F.2d 68, 70-71 (3d Cir. 1972); *Walle v. Sigler*, 456 F.2d 1153, 1155-56 (8th Cir. 1972); *United States ex rel. Holliday v. Adams*, 443 F.2d 7 (2d Cir. 1971). *See also Spencer v. Texas*, 385 U.S. 554, 564 (1967).

Erroneous evidentiary rulings will not cause a writ to issue unless a specific constitutional guarantee has been

violated, which is not claimed by petitioner here, or the error is of such magnitude that the result is a denial of fundamental fairness. *United States ex rel. Clark v. Fike*, 538 F.2d 750, 757 (7th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977); *accord, United States ex rel. Bibbs v. Twomey*, 506 F.2d 1220, 1222 (7th Cir. 1974), *appeal after remand*, 538 F.2d 151 (1976) (*en banc*), *cert. denied*, 429 U.S. 1102 (1977); *United States ex rel. Harris v. State of Illinois*, 457 F.2d 191, 198 (7th Cir.) *cert. denied*, 409 U.S. 860 (1972). The Fifth Circuit's standard for judging a constitutional error of a state in admitting prejudicial evidence is whether it is "material in the sense of a crucial, critical, highly significant factor [in the outcome of the case]." *Lawrence v. Wainwright*, 445 F.2d 281, 282 (5th Cir. 1971) (*citing Luna v. Beto*, 395 F.2d 35, 41 (5th Cir. 1968) (*en banc*), (Brown, Chief Judge, concurring specially, in which 7 judges joined), *cert. denied*, 394 U.S. 966 (1969)). *Accord, Anderson v. Maggio*, 555 F.2d 447, 451 (5th Cir. 1977). By that standard, the other crimes and wrongs here were not material. As the district judge wrote: "While petitioner may not have enjoyed an error-free trial at the state level, the cumulative effect of the erroneous rulings by the trial court did not deprive the petitioner of due process of law within the meaning of the Fourteenth Amendment."

Closely tied to the test of a denial of fundamental fairness is the third factor in our decision to uphold the denial of the writ: the strength of the evidence against petitioner makes any such error here harmless beyond a reasonable doubt. Where the evidence of guilt "while clearly sufficient" is "not exceedingly strong," there may be "a reasonable possibility that the error might have contributed to the conviction." *United States ex rel. Smith v. Rowe*, 618 F.2d 1204, 1213 (7th Cir.), *vacated and remanded on other grounds*, 449 U.S. 810 (1980). However, where, as here, the evidence of guilt is so strong that, even without the admission of the disputed evidence, the state proved its case against the petitioner beyond a reasonable doubt, the writ should not issue. *Compare United States ex rel. Ross v. LaVallee*, 448 F.2d 552, 554 (2d Cir. 1971) (Erroneously admitted

statement of co-defendant was harmless due to "overwhelming independent evidence against petitioner . . . ."); *Subilosky v. Moore*, 443 F.2d 334, 336 (1st Cir.), *cert. denied*, 404 U.S. 958 (1971) (Admission of prior invalid convictions to impeach defendant harmless error in view of "relative insignificance" of evidence and "persuasiveness of the other evidence."); *United States ex rel. Gaines v. Randle*, 435 F.2d 700, 701 (3d Cir. 1970) (Habeas relief was denied due to other "strong affirmative evidence" of guilt and the fact that the illegally seized evidence "contributed nothing material to the case against him."); *United States v. Garrison*, 280 F.2d 493, 499 (7th Cir. 1960) (Improper question to defendant not reversible error in light of jury instructions to disregard the question and the "clear and convincing" evidence of guilt), with *Potts v. Estelle*, 529 F.2d 450, 455 (5th Cir. 1976) (It was not harmless error to admit evidence of nine uncounseled misdemeanor convictions of defendant where the effectiveness of his testimony hinged largely on the jury's assessment of his credibility and the improper evidence went directly to that credibility.); *Favre v. Henderson*, 464 F.2d 359, 366 (5th Cir.), *cert. denied*, 409 U.S. 942 (1972) (Erroneous admission of police testimony about informants' reports where defendant was denied the right to confront the informants as witnesses against him, was not harmless error because, "[w]ithout the disputed testimony, the prosecution had a questionable case, ...").

COERCION OF JURY BY REPLAYING TAPES

The most troublesome question raised by petitioner is whether the judge impermissibly intruded on the jury's function and coerced the jury into a guilty verdict by offering to replay and replaying tapes of incriminating conversations, some twenty hours after he had turned down two jury requests, the first for transcripts of those tapes and the second for a machine to play the tapes themselves.

The jury retired to deliberate on April 15 at 1 P.M. Some three hours later they sent a request to the judge for an Illinois road map and the transcript of certain

tapes. Without notifying counsel, the court sent word to the jury that these items were not in evidence, as indeed they were not, although the content of the tapes had been played to the jury. It was within the judge's discretion to deny the jury the transcripts.[4] *United States v. Toney*, 440 F.2d 590, 591-592 (6th Cir. 1971); *see also United States v. Braverman*, 522 F.2d 218, 224 (7th Cir.), *cert. denied*, 423 U.S. 985 (1975) (It was within the judge's discretion to have a tape of all instructions replayed in response to a jury inquiry and to allow the jurors to take notes while the tape was played.) Although a trial judge should consult with counsel before denying a request and give the answer in open court, a judge's refusal to grant a jury request for further instructions does not constitute impermissible "communication between the judge and the jury." *Miller v. Pate*, 300 F.2d 414, 42[illegible] (7th Cir. 1962), *cert. denied*, 371 U.S. 898 (1963). Therefore, although a judge should consult with counsel first, it is not a denial of due process to turn down *ex parte* a jury request for further instructions. *Accord, United States v. Medansky*, 486 F.2d 807, 816 (7th Cir. 1973), *cert. denied*, 415 U.S. 989 (1974) (It was harmless error for judge to enter jury room, without objection of the attorneys, to explain his denial of transcripts to the jury and, in answer to a juror's query, state that the transcript was of a prior trial); *United States v. Di Pietto*, 396 F.2d 283, 287 (7th Cir. 1968), *vacated and remanded on other grounds*, 394 U.S. 310 (1969) (Not reversible error for judge, when informed jury was unable to reach a verdict, to send *ex parte* communication to jury to keep deliberating); *Estes v. United States*, 335 F.2d 609 (5th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965) (Additional written charges to jury should have been given in open court, but failure to do

[4] In *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691, 697 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978), it was not coercive for the judge to ignore a jury message at 10:25 P.M. that the jury could not reach a verdict and wished to be bedded for the night. The jury brought in a verdict of guilty the next morning at 3:22 A.M., after having deliberated through the night.

so was not reversible error). *Compare United States v. Clavey*, 565 F.2d 111, 118-20 (7th Cir. 1977), *aff'd. on rehearing*, 578 F.2d 1219 (*en banc*) (*per curiam*), *cert. denied*, 439 U.S. 954 (1978) (Despite this circuit's disapproval, under Federal Rule of Criminal Procedure 43, of trial court's failure to notify counsel of jury inquiries and its refusal to answer those requests, such error was harmless). *Compare United States ex rel. Tobe v. Bensinger*, 492 F.2d 232, 238-39 (7th Cir. 1974) (Although communications between jury and court or third person, such bailiff, "outside the presence of the defendant and his counsel are presumptively prejudicial," if "the communications were harmless or lacked prejudice," the writ will not issue; statements in nature of an *Allen* charge by bailiff telling jurors they had to keep deliberating and reach a decision had "a coercive effect resulting in prejudice to the defendant where they [were] void of such an admonition" that "no juror should relinquish his conscientiously held convictions to join in the majority verdict" because "any influence which emphasizes the importance of agreement to the exclusion of the dictates of conscience is coercive and prejudicial."); *and United States v. Dellinger*, 472 F.2d 340, 378-80 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973) (Generally communications to jury from judge should be in open court, although *ex parte* messages denying transcripts or to keep deliberating have been harmless in other cases, but error was not harmless where matter was not brought to counsel's attention until months later in an article on the "Chicago Seven", there was evidence the verdict might have been a compromise, and the marshal was said to have told the jury that "the jury might be sequestered for a substantial further period before the judge would accept the fact of a hung jury.").

Sometime after the judge had denied the transcripts, the jury requested a tape recorder and the tapes, a request which, according to at least one circuit, he could have granted. *Hamilton v. United States*, 433 F.2d 526, 530 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 944 (1971). However, the trial court, after consulting with counsel, determined to deny the request. The federal habeas court's statement that the trial judge denied the request

"for reasons unrelated to the propriety of the request" is not altogether correct. At the time he denied the request, the judge pointed out not only that the jury might damage the tapes or accidentally erase a portion but also that the jury had heard the material on the tapes sufficiently at trial and during closing argument. Both sides agree that it was within the sound discretion of the trial judge to deny the request, whichever was his primary reason for doing so.[5]

In hindsight, it is obvious that if the judge's only concern was the jury's inability to operate the machine without damaging the tapes, he should have told the jury immediately that it could return to open court to have the tapes replayed.[6] Instead, he did not offer the jury that option until much later, after it had deliberated a total of twenty hours (without discounting dinner and lunch time for two days), at which point he called in counsel to announce his intentions. He told them he intended to recall the jurors, inquire if they were making progress, and, if the answer was no, ask if replaying the tapes would be helpful. He gave no indication what he would do if the foreman said they *were* making progress, which in fact is what he did answer. At that juncture, the judge asked the foreman, and each juror in turn, "Would it help, in your opinion, in this case if you were to hear the tapes played here in the courtroom?"

When each answered in the affirmative, he directed that the tapes be replayed, after which the jury resumed

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[5] At least one circuit has held that it was not reversible error for the judge to allow an F.B.I. agent who was a witness for the prosecution to replay the tapes for the jury in closed Court with the presence of counsel for defendant, rather than with defendant present in open court, although it said it would not condone such practice in the future. *United States v. Florea*, 541 F.2d 568, 570-72 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).

[6] The content of the tapes, while introduced primarily in support of the two conspiracy counts that were later thrown out, was also corroborative of an overt act committed prior to Weathington's collaboration with the police.

deliberations for 45 minutes before bringing in a verdict of guilty of conspiracy and solicitation.

Petitioner seems to argue that the judge's replaying of the tapes was not the delayed grant of a jury request that he had initially denied but was the selection by the judge of certain evidence to highlight, which intruded impermissibly on the jury's function. We do not accept that reading of the situation. In our opinion, that very material had been requested twice by the jury. The state appellate majority did not address the issue, as the justice who wrote the opinion dissented on that point. He stated he believed that the trial judge, by replaying the tapes, implied to the jury that he considered that evidence to be critically important. He said that the court abused its discretion by volunteering the evidence to the jury and thus directing its attention to that evidence. We disagree with the state court dissent. In our opinion the trial judge did not direct the jury's attention to material *he* selected but merely replayed for the jury the very material the *jury itself* had selected and twice requested hearing. The Second Circuit has gone so far as to allow a judge to add evidence to a jury request, which the judge did not do here:[7]

> [R]eversal for submitting material in addition to that requested is required only where the submission might indicate, or be fairly taken by the jury to indicate, prejudice of the judge against the defendant, as, e.g., when the judge insisted on submitting evidence favorable to the prosecution that was in no way germane to the request, or when it leads to biasing of the record.

United States v. Gentile, 525 F.2d 252, 261 (2d Cir. 1975), *cert. denied*, 425 U.S. 903 (1976). That court cited with approval the ABA Standards Relating to the Ad-

[7] This circuit has held that a judge can add to the instructions he is requested by the jury to reread or reread all the instructions if he feels such is necessary to avoid confusing or misleading the jury. *United States v. Castenada*, 555 F.2d 605, 611-12 (7th Cir.), *cert. denied*, 434 U.S. 847 (1977).

ministration of Criminal Justice, Trial by Jury § 5.2(b) (1968).[8]

We see the only valid issue, then, as *not* whether the judge impermissibly focused the jury's attention on evidence in which it had shown no interest,[9] but whether, by delaying so long in granting the request, the judge had lost the discretion to grant the request that he admittedly had at the moment it was first made. The petitioner's second argument as to the delay—that the belated replaying had a coercive effect on the jury because it had passed the point of needing to rehear that evidence—is, in our opinion, less persuasive. Not only is it based on pure surmise, but it is belied by the jurors' unanimous affirmative responses to the judge's query as to whether replaying the tapes would be helpful.

It is true that "[c]ommunications between judge and jury must be handled with particular care . . ." *United States v. Peskin*, 527 F.2d 71, 85 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976) (It was not coercive for the judge to ask the jurors if they thought they could reach a verdict if he gave them one-half hour more, at least

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[8] The Standard, as quoted by the Second Circuit, provides that the judge *must* grant a jury request to review specific evidence and *may*, in its discretion add "other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested." *Id.* at 260-61.

[9] We find the two major cases relied on by petitioner to be inapposite. In *People v. Baltimore*, 7 Ill. App. 3d 633, 288 N.E. 2d 659 (1972), the judge asked the deadlocked jury in a murder case whether it could reach a verdict without regard to the death sentence. Unlike the present case, the judge's remark was coercive in that it could have indicated to the jury that the judge believed the defendant was guilty and it was not made in answer to a jury request. Likewise, the judge's statement in *People v. Golub*, 333 Ill. 554, 165 N.E. 196 (1920) was coercive: when the jury reported itself deadlocked, he said that they should have no trouble reaching a verdict on that evidence, which could have been taken by the jury to mean that the defendant was clearly guilty in the judge's opinion.

absent an objection by defendant at the time.). Two cases from this circuit are helpful on the issue of whether the timing of the judge's communication to the jury about replaying the tape made it coercive. One, cited by the federal habeas court, deals with whether, when there is a lack of deadlock, the *Allen* charge is warranted; by analogy it provides some precedent for holding that repeating evidence or instructions to a non-deadlocked jury is not *per se* coercive. In *United States v. DeStefano*, 476 F.2d 324 (7th Cir. 1973), defendant argued that giving the *Allen* charge to a jury that had given no indication of deadlock was coercive. This court rejected that argument, distinguishing a Ninth Circuit case that bolstered DeStefano's contention, *United States v. Contreras*, 463 F.2d 773 (9th Cir. 1972), because the jury in *Contreras*, by asking for further instructions, had shown confusion about the law rather than an inability to reach a verdict. *DeStefano*, *supra*, at 337. This Court found that the timing of the charge was not only *not* coercive *per se* but was not "a violation of the ABA Standards," which state that a court can give the *Allen* charge "[i]f it appears to the court that the jury has been unable to agree, ..." *Id.* at 336-37. In contrast to the jury in *Contreras*, the *DeStefano* jury, by not yet announcing a deadlock, had not shown an inability to reach a verdict. Indeed, the *DeStefano* court found that the *Allen* charge was *less* coercive because the jury had not yet announced to the court that it was deadlocked.

> Furthermore, the fact that the jury did not indicate that it was deadlocked before the instruction was given may actually be taken as evidence that the charge was not coercive, since under such circumstances dissenting jurors would be less likely to believe that the trial judge was trying to shake their decision.

Id. at 337. *Accord*, *United States v. Munroe*, 424 F.2d 243, 247 (10th Cir. 1970) (*Allen* charge, although verdict followed 40 minutes later, was not coercive where jury was making progress when charge was given). Following the reasoning of *DeStefano*, the fact that the jury

that found petitioner guilty here had announced that it was making progress was one factor tending to show *lack of coercion* from the replaying of the tapes; a non-deadlocked jury is less susceptible to such coercion.

It is true that the court in *DeStefano* also cited the four-hour delay in verdict after the *Allen* charge as a factor in determining lack of coercion. *DeStefano*, *supra*, at 337. *Accord*, *United States v. Bambulas*, 471 F.2d 501, 506 (7th Cir. 1972) (Four hours' deliberation after *Allen* charge was a factor in determining lack of coercion.) Although the jury here reached a verdict after forty-five minutes, it had already deliberated twenty hours when the tapes were replayed and could have been on the verge of a verdict at any rate; the foreman had announced they were making progress. The ABA Standards, *supra*, Commentary to §5.4(b) at 154, and some courts consider shortness of time in reaching a verdict after an *Allen* charge as irrelevant to whether the charge was coercive when given, *e.g.*, *United States v. Giacalone*, 588 F.2d 1158, 1167-68 (6th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979). Still others have found no coercion even where the verdict was returned in a very short time after the charge was given, *e.g.*, *United States v. Betancourt*, 427 F.2d 851 (5th Cir. 1970) (Just under two hours); *United States v. Hynes*, 424 F.2d 754 (2nd Cir.), *cert. denied*, 399 U.S. 933 (1970) (Five minutes). This court has upheld a verdict as noncoercive that was rendered only twenty minutes after a polling showed eleven of twelve jurors reported deadlocked and an hour after an earlier *Allen* charge where the jury had deliberated almost thirteen hours before the *Allen* charge was given. *United States ex rel. Anthony v. Sielaff*, 552 F.2d 588 (7th Cir. 1977). Considering the danger inherent in the so-called dynamite charge, as opposed to merely rehearing evidence already heard, the time lapse before verdict here does not indicate coercion.

Another Seventh Circuit case, not cited by either side, is even more helpful on the issue of whether the timing of the judge's belated offer to comply with the jury's

request was coercive.[10] Petitioner, in *United States v. Quintana*, 508 F.2d 867, 878 (7th Cir. 1975), protested "the alleged failure of the trial judge to make a prompt response to the jury's request for a definition of the words 'entrapment' and 'coercion'." The jury request, involving the defendant's principal defenses, was made about 6 p.m. one day, six hours after beginning its deliberations. Upon receiving word from the marshal that the judge wished them to keep deliberating until they heard from him, they continued until 10:15 p.m. Although they resumed deliberations at 9 a.m. the next morning, they were not re-read the key instructions until 10:30 a.m. *Twenty minutes later*, the jury reached a verdict. This court wrote:

> [Petitioner] does not complain that the instructions given were incorrect, but rather that allowing the jury to remain in some confusion on those defenses for five hours of deliberation was prejudicial error where entrapment and coercion were the principal grounds of his defense. . . .
>
> The ultimate test is whether the procedure as a whole was so likely to have confused the jury that reversal is required. . . . We hold that it was not. . . . [T]he jury was not under great pressure to terminate its deliberations. After the jury heard the supplemental instructions the jurors continued to deliberate for twenty minutes. The verdict they

[10] Respondent primarily relies on *People v. Reynolds*, 57 Ill. App. 3d 593, 373 N.E.2d 650 (1978) on this issue. In *Reynolds* one juror could not reach a verdict without review of certain testimony, but the court, believing that such would involve too much time, refused the foreman's request. Shortly thereafter, upon reconsideration, the judge asked that the juror narrow the request to the specific testimony desired and then had the reporter read back the identification testimony of the police officers that was specified, while refusing defendant's request that it be put in context by a rereading of the cross-examination of the officers. However, the delay in granting the request in *Reynolds* was minimal next to the time lag in acceding to the jury's request in the instant case.

> reached was consistent with the overwhelming weight of the evidence.

Id. at 878. We do not believe that the petitioner has carried his burden of showing that the judge's belated grant of the jury's request for the tapes, even if unwisely delayed, so confused the jury or intruded on its function as to deny petitioner due process and require that his conviction be vacated.

We therefore affirm the grant of the writ as to the conspiracy conviction and the denial of the writ as to the solicitation conviction.

AFFIRMED.

SWYGERT, *Senior Circuit Judge*, concurring in part and dissenting in part. I respectfully dissent from the majority's holding that the replaying of certain tapes for the jurors during their deliberations did not deny petitioner a fair trial. I believe that the judge's actions interrupting the jury's deliberations so prejudiced petitioner as to violate his constitutional right to a fair trial by an impartial jury.

Prior to sending the jury out to deliberate, the trial judge determined that he would not allow tapes of conversations between petitioner and a key prosecution witness played into evidence at the trial to be taken into the jury room during deliberations. About two hours into deliberations, the jury sent a message to the judge asking for a road map and a transcript of the tapes. The judge denied the request, without informing counsel, because neither item was in evidence. The jurors then asked that the tapes and a tape recorder be sent in. The judge discussed the question with the attorneys for both sides, then denied the request on the grounds that the jurors might accidentally damage the tapes and that the jurors had heard the tapes enough during the trial.

The jury deliberated for the rest of that day and part of the next when the trial judge informed the attorneys that he was going to call the jury back into court to ask

if they were making progress and if not, to ask whether hearing the tapes again would help them arrive at a verdict. Counsel for petitioner objected, contending that replaying the tapes at that time would place prejudicial emphasis on that evidence. Despite this objection, the judge had the jury brought back into the courtroom and asked the foreman if the jury was making progress in its deliberations, to which the foreman answered in the affirmative. The trial judge nevertheless asked each juror if it would help them to hear the tapes again, and each juror said yes. The tapes were then played for the jury over petitioner's objections. The jury retired to the jury room for forty-five minutes before returning a guilty verdict.

Errors of the trial court will not be reviewed by a federal court considering a petition for habeas corpus unless those errors amount to a constitutional violation. *See Scalf v. Bennet*, 408 F.2d 325, 327 (8th Cir. 1969), *cert. denied*, 396 U.S. 887 (1969). The Sixth Amendment, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, guarantees a criminal defendant the right to trial by an impartial jury and statements or actions by the trial court that could influence the jurors violate this constitutional right and the due process right to a fair trial. *Cf. Parker v. Gladden*, 335 U.S. 363, 364-66 (1966).

Considering the facts in the instant case, I believe that the trial court's decision to replay the tapes could have resulted in the overemphasis of the probative value of the tapes or could have been construed by the jurors as an indication that the trial judge wanted them to return a verdict of guilty. It may have been proper, as the majority concludes, for the judge to have replayed the tapes in response to the jury's request, but here the trial court denied that request. After the jury had been deliberating for approximately twenty hours, he called them into court to ask if they were making progress. Then, despite the affirmative reply from the foreman, he played the tapes again for the jurors. This cannot be characterized as mere "delay" in responding to the jury's request to review this evidence because the trial judge had already expressly denied that request. In

these circumstances, playing the incriminating tapes even after the jury indicated that it was progressing to a verdict was prejudicial. This conclusion that the jurors were influenced is further supported by the fact that after hearing the tapes, they returned a guilty verdict within forty-five minutes. *See United States v. Harris*, 391 F.2d 348, 356 (6th Cir. 1968).

For the foregoing reasons, I would reverse the district court's denial of the writ on the petitioner's conviction for solicitation.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit